REPORT TO THE ATTORNEY GENERAL OF CANADA

ADVICE AND RECOMMENDATIONS RESPECTING CERTAIN CERTIFICATES OF ANALYST ISSUED BY HEALTH CANADA

THE HONOURABLE W. DAVID GRIFFITHS, Q.C.

MAY 23, 2001

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REPORT TO THE ATTORNEY GENERAL OF CANADA: ADVICE AND RECOMMENDATIONS RESPECTING CERTAIN CERTIFICATES OF ANALYST ISSUED BY HEALTH CANADA BY THE HONOURABLE W. DAVID GRIFFITHS, Q.C.

OVERVIEW

Most drug prosecutions involve, as a substantive component, proof of analysis and identification of a substance forming the subject matter of the Crown's allegations. To establish this element, the Crown generally tenders a Certificate of Analyst which states that a designated analyst has examined the substance and found it to contain a controlled substance. A sample copy of such certificate is attached as "Appendix A". Analysts who prepare these certificates are designated by the Minister of Health and are employed in various Health Canada Drug Analysis laboratories. Recently, Health Canada identified concerns with some of the certificates issued by one analyst in the Toronto Drug Analysis Service laboratory. This analyst was employed by Health Canada since June 1982, and was working for the Drug Analysis Service laboratory since June 1988. After March 8, 2001, when the concerns were identified, no further certificates were issued by this analyst.

An internal review by Health Canada of the certificates issued by this analyst and any available supporting documentation was recently completed. As I shall point out later in this report, this review process has identified a number of problematic certificates.

As well, Dr. Joel Mayer, Deputy Director, Scientific Affairs at the Ontario Centre of Forensic Sciences has been retained by Health Canada to review the methodologies

used by Health Canada to assess the work of the individual in the Toronto laboratory, analyze the processes used by Health Canada to review the work of all other analysts in the Toronto and all other laboratories across Canada, advise Health Canada on changes and improvements that must be made to its Drug Analysis operations and quality assurances systems and oversee the implementation of the plan to prepare the Drug Analysis Laboratories to seek and obtain accreditation from international bodies.[1] I am advised that, while Dr. Mayer has not completed his entire work for Health Canada, he has reviewed and favourably passed upon the criteria used by Health Canada in evaluating the acceptability or unacceptability of certificates issued by the subject analyst.

MANDATE

My retainer to the Attorney General of Canada effective April 19, 2001 is to provide advice and recommendations on the steps to be taken to deal fairly and expeditiously with those who may be affected by problematic certificates issued by the analyst in question and to report within 30 days of my appointment. My mandate does not permit me to conduct a fact-finding inquiry or an independent audit of Health Canada laboratories or the work of any analyst. For the purpose of this report, I have accepted the findings of fact of Health Canada. My advice and recommendations will be directed to the appropriate steps to be taken to address, in particular, any potential prejudice to those accused convicted[2] of drug offences whose proceedings may have been affected by problematic certificates.

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[1]Government of Canada News Release dated April 19, 2001.

[2]For convenience, persons charged with, on trial for, or convicted of offences are referred to as "accused." Persons found guilty and granted conditional or absolute discharges are similarly referred to.

THE PARTIES CONSULTED

In preparing this report, I have had consultation with key personnel employed in the Health Canada Drug Analysis Service. I have also conferred with and received written submissions from both Crown counsel involved in the prosecution of drug offences and senior members of the defence bar, the latter through the auspices of the Ontario Criminal Lawyers' Association. I am indebted to them all for their valuable assistance.

PREPARATION AND ADMISSION OF THE CERTIFICATE

The Drug Analysis Service of Health Canada (DAS) provides analysis service to all Canadian police agencies (Federal, Provincial and Municipal). Specifically, DAS analyzes suspected illicit drugs, the results of which are often used as evidence in drug prosecutions for offences under the *Controlled Drugs and Substances Act*[3] and predecessor legislation.

All or part of a suspected controlled substance is packaged and sealed by police officers in pre-numbered exhibit envelopes (similar to Appendix B) and submitted to the DAS for analysis. The DAS analyst opens the sealed package and removes the substance from which a sample is obtained. It is analyzed and examined using a range of techniques and equipment. Where it is found to contain a controlled substance, a Certificate of Analyst is issued, identifying the controlled substance found.[4] The portion

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[3]R.S.C. 1996, c.8, ss.1-60, as amended.

[4]In some cases, a *quantitative* analysis is also performed on samples of the submitted substance. This analysis determines the purity of the substance. Accordingly, quantitative results may also be reflected on a Certificate of Analyst.

of the sample that is not consumed in the analysis is returned to the submitting police officer. A chain of custody of the exhibit is maintained and documented in the records of DAS from the time the exhibit is received from the submitting police officer until the time it is returned.

Sections 45 and 51 of the *Controlled Drugs and Substances Act* contemplate the admission of the certificate into evidence, subject to the right of the party against whom a certificate is produced to seek leave of the court to require the analyst's attendance for cross-examination. Notice of an intention to introduce the certificate in evidence, together with a copy of the certificate, must generally be served on the accused.[5]

Section 51 provides in part:

> 51. (1)...a certificate or report prepared by an analyst....is admissible in evidence in any prosecution for an offence under this Act or the regulations or any other Act of Parliament and, in the absence of evidence to the contrary, is proof of the statements set out in the certificate or report, without proof of the signature or official character of the person appearing to have signed it.
>
> 51. (2) **Attendance of analyst** – The party against whom a certificate or report of an analyst is produced under subsection (1) may, with leave of the court, require the attendance of the analyst for the purpose of cross-examination.

The certificate of the analyst, therefore, becomes *prima facie* evidence of the controlled substance but it is open to the accused to challenge the certificate of the analyst by adducing "evidence to the contrary". The Supreme Court of Canada[6] said,

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[5]Section 51(3) of the Act.

[6] *Oliver v. The Queen* (1981), 62 C.C.C. (2d) 97 (S.C.C.) per Lamer C.J. at 105.

> 'Evidence to the contrary' is any evidence which tends to put in doubt the probative value Parliament has legislatively conferred upon the statements contained in a s.9 certificate. This evidence may be in regard to the analyst himself, his qualifications, integrity, or in regard of the procedures he followed to draw his conclusions. Section 9 has been enacted to dispense with the calling of experts to testify in cases where the nature of the suspect substance is not really in issue. Though, at the outset, a certificate does create a presumption, the words 'evidence to the contrary' should not be construed so as to confer upon an analyst's assertions in a certificate any ultimate greater probative value than when those same assertions are adduced under oath in court.

The authors of the textbook *Drug Offences in Canada*,[7] make the following comment:

> In practice, defence counsel rarely have the opportunity to cross-examine a designated drug analyst. As a rule, the occasion only arises where: (a) for one reason or another, the certificate of the analyst is inadmissible: (b) a successful application has been made to the court for the attendance of the analyst; or (c) where, in the words of Wilson J. in *R. v. Klippenstein* (1975), 28 C.C.C. (2d) 235 (Man.Q.B.), 'a generous prosecutor'...offered the analyst for cross-examination.
>
> It seems fairly clear that both the legislation and the courts favour proof of this element of the Crown's case by means of certificate evidence. None the less, there are occasions where it would be beneficial – indeed, perhaps crucial –for the defence to have the opportunity to cross-examine the Crown analyst respecting both the testing procedures followed and the conclusions reached.

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[7] MacFarlane, Bruce A., *Drug Offences in Canada*, Third Edition, November 2000, Canada Law Book at 15-2.

The ability to seek leave to cross-examine the analyst or tender "evidence to the contrary" is further addressed later in this report.

DRUG OFFENCES GENERALLY

The major drugs in Canada are cocaine, heroin and cannabis. Designer drugs, such as ecstasy are less significant, although growing in popularity. Substantive drug offences include possession, trafficking, possession for the purpose of trafficking and importing the controlled substance. Conspiracy offences also figure prominently in drug-related prosecutions. Some of these offences do not require, as an essential element of proof, the analysis and identification of a controlled substance. For example, trafficking in a substance represented or held out to be a controlled substance is an offence, regardless of whether the substance was truly an illicit substance.[8] Further, even in those majority of cases where the identification of the substance is an essential element of the offence charged, the Certificate of Analyst is frequently unchallenged at trial. For example, in possession cases, proof of the element of control, or the actual or constructive possession of the substance, rather than its identity, is often the central issue.

IDENTIFICATION OF THE PROBLEM

The analyst in question was employed with Health Canada in the Toronto laboratory since June 1988. The analyst has issued 16,648 certificates for use in Ontario and 340 certificates for use in Quebec.

In March 2001, concerns were raised about the work done by this analyst. A

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[8] See section 5(1) of the *Controlled Drugs and Substances Act* and the recent case of *R. v. F.(M.)* (2000), 146 C.C.C. (3d) 187 (Ont. C.A.).

review of the analyst's work established non-compliance in a number of instances with standard operating procedures mandated by Health Canada.

When an analyst examines and analyzes substances, laboratory ("lab") notes are made. As well, some tests generate instrument printouts, for example, where alleged hard drugs are analyzed through a spectrometer. Where Health Canada still has available the supporting documentation pertaining to the certificates issued, a full review of that documentation has been done. In some cases, destruction of all or some of the supporting documentation permits limited or no review. The availability or lack thereof of underlying documentation for various time periods and respecting different kinds of drug analyses is outlined below.

THE ANALYSIS OF ALLEGED HARD DRUGS

A. Standard Procedures

The standard procedures for testing of hard drugs (for example: cocaine, heroin and amphetamines) and of cannabis are different. Hard drug testing involves observations by the analyst (e.g. a description of appearance and weight), a screening test (which yields preliminary results only) and a confirmatory test using spectrometers. The spectrometers yield analytic data reproduced on printouts. The profile or spectra of the questioned substance is compared to the profile or spectra of a known illicit substance. The analyst examines these spectra and opines whether they are sufficiently similar to permit positive identification. A mixture of substances requires the analyst to isolate and purify the alleged illicit substances and then obtain spectral data for identification.

B. *Available Documentation (Hard Drug Testing)--Overview*

For analyses conducted between February 6,1996 and March 8, 2001 by the subject analyst, Health Canada retains all of the analyst's lab notes and instrument printouts. These have been fully reviewed. All instrument printouts relating to analyses of alleged hard drugs conducted by this analyst prior to February 6, 1996 were more recently destroyed. All lab notes relating to analyses of alleged hard drugs conducted by this analyst prior to January 10, 1991 have also been destroyed. This means that for the period January 10, 1991 to February 6, 1996, a limited review (that is, of lab notes but not instrument printouts) could be performed. For the period preceding January 10, 1991, no review could be performed.

C. *February 6, 1996 to March 8, 2001*

As noted, in carrying out the internal review of the certificates issued by the analyst during the above period, Health Canada had available the lab notebooks of the analyst and the instrument printouts containing the profile or spectra of the questioned substance. 3,540 certificates issued during this period concerning hard drugs were examined. Of these, 151 were found to be questionable. That is, the evidence did not adequately support these 151 certificates and therefore, in the opinion of Health Canada, these certificates should not have been issued. The review of the analyst's work revealed failure in procedures described as follows:

- Exhibits (that is, samples of the substance) misidentified
- Analyst identified a different substance than that reported on the certificate
- Confirmatory evidence not sufficient to justify the issuance of a certificate
- Certain analytical observations missing from a notebook and therefore the certificate should not have been issued

- The analyst made significant data entry errors in the system and in the records and thus certificates could not be supported
- Errors were made in the dates, i.e. the certificate is dated in the lab notebook before the date of analysis
- The proper analysis procedure was not followed, leaving the identity of the substance reported in doubt.

Some of these failures may involve the inaccurate recording of otherwise valid testing results. Some are more fundamental. For example, the largest number of failures represents cases in which the spectrometer printouts were insufficient to confirm the identity of the suspected substance, without purifying and retesting the substance. In all cases, the failings have caused Health Canada to conclude that the issuance of the certificates can no longer be supported.

D. January 10, 1991 to February 6, 1996

As noted, for the 3,482 hard drug certificates issued by the subject analyst during this period, Health Canada had available to it the analyst's lab notebooks, but not the independent, confirmatory instrument printouts. On the basis of this more limited review, Health Canada concluded that the issuance of 14 certificates can no longer be supported. The problems generally with these certificates was there were inconsistent findings reported on the certificate from those recorded in the lab book; and the lab notebooks indicated insufficient testing had been carried out to support the findings.

E. Pre January 10, 1991

For the 1,690 hard drug certificates issued during this period, no review can be

undertaken, given the unavailability of any lab notebooks or instrument printouts. [9]

THE ANALYSIS OF ALLEGED CANNABIS

A. Standard Procedures

Cannabis testing generally involves two to three tests, all of which must be positive[10], to justify the issuance of a certificate. The tests are as follows:

> A microscopic examination of the botanical features (where plant material is involved) to look for certain features characteristic of the cannabis plant.
>
> The "Duquenois-Levine" test, a colour test used for the analysis of suspected cannabis (marijuana and hashish), where chemicals are added to the substance to initiate a colour producing reaction.
>
> Thin layer chromatography.

The above tests do not produce data printouts. Notations are made in the analyst's notebooks.

B. Available Documentation (Cannabis Testing)--Overview

For cannabis analyses conducted between May 8, 1991 and March 8, 2001 by the

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[9]Health Canada's database came into existence in December 1988. Accordingly, it is not presently known whether the subject analyst issued any certificates earlier in 1988.

[10]Under some circumstances, unnecessary to elaborate upon here, only two tests need be positive.

subject analyst, Health Canada retains all of the analyst's lab notes. No other documentation is generated for cannabis analyses. The lab notes have been fully reviewed. The lab notebooks relating to analyses of alleged cannabis conducted by this analyst prior to May 8, 1991 have also been destroyed. As a result, for the period preceding May 8, 1991, no review of cannabis certificates can be performed.

C. *May 8, 1991 to March 8, 2001*

As noted, in carrying out the internal review of the certificates issued by the analyst during the above period, Health Canada had available the lab notebooks of the analyst. These represent the only documentation made for cannabis analyses, other than the certificates themselves. 7,932 certificates issued during this period concerning cannabis were examined. Of these, 27 certificates were found to be questionable. Generally, the reasons for discrediting these certificates were that the conclusions found in the lab books differed from those on the certificate or there was insufficient analytical data generally reported in the lab books to support the conclusions found on the certificate.

D. *Pre May 8, 1991*

Four cannabis certificates were issued by this analyst during this period. No review of these certificates can be undertaken, given the unavailability of any lab notebooks.

THE QUANTITATIVE ANALYSIS OF DRUGS

A. *Standard Procedures*

Apart from analysis to determine the identity of a substance, *quantitative* analysis can be done to determine the purity (and therefore the amount) of a controlled substance. A

quantitative test does not serve as an independent test of identification. Health Canada is usually not requested to perform quantitative analysis on substances submitted. However, such analysis may be requested where potentially relevant to the issues at trial. The quality of a controlled substance may be relevant to an accused's level of involvement in the drug hierarchy. The quality of a controlled substance may be relevant to the sentence imposed.[11] It may also be relevant to whether an illicit substance was possessed for personal use or for the purposes of trafficking.[12] Apart from its uses at trial, police officers may request quantitative analysis to advance or direct the course of their investigations. Generally, though not invariably, quantification results, where performed, are recorded on the same Certificate of Analyst tendered to prove the substance's identity.

To perform quantitative analysis, two separate samples of the alleged controlled substance are taken, weighed, dissolved/extracted into a liquid and then run through a chromatograph. The response of the samples is compared to the response of a known concentration of the corresponding reference standard. The analysis produces instrument printouts that are the subject of calculations to produce a result. In addition to the instrument printouts, notations are made in lab notebooks.

B. Available Documentation (Quantitative Analysis) and Results of Health Canada's Review

From December 1988[13] to March 8, 2001, the subject analyst certified 1,595

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[11]See, for example, *R. v. Marton* [1980] O.J. No. 868 (Ont.C.A.); *R. v. Prendergast* [1996] O.J. No. 1034 (Ont.C.A.); *R. v. Williams* [1991] O.J. No. 2812 (Ont.C.A.); *R. v. Caracciolo* [1990] O.J. No. 785 (Ont.C.A.); *R. v. Dardarian* [1990] O.J. No. 790 (Ont.C.A.).

[12]MacFarlane, Bruce A., *Drug Offences in Canada*, Third Edition, November 2000, Canada Law Book at 6.140, 6.160. The purity of the controlled substance might also be relevant to whether it was to be imported or exported.

[13]See footnote 9.

quantitative results. 118 related to alleged cannabis and 1,477 related to alleged hard drugs. All instrument printouts pertaining to tests performed prior to September 7, 2000 have been destroyed. All lab notebooks have been preserved pertaining to these tests. For the period September 7, 2000 to March 8, 2001, there were a total of 65 exhibits with quantitative results for which there is reviewable quantitative instrumental data, and three on which there is no data capable of being reviewed. Accordingly, there were 1,530 quantifications performed for which instrument printouts are no longer available, 1,527 performed before September 7, 2000 and three performed afterwards.

No meaningful review can be undertaken of the 1,530 quantifications performed for which instrument printouts are no longer available. The lab notes for the analyst's quantitative analyses are not sufficient to permit even a limited review. The review of the remaining 65 quantifications revealed that 13 of the analyst's results were identified as unacceptable, of which 12 related to hard drugs and one related to cannabis. (Only two Quebec quantifications were performed, both relating to alleged hard drug analyses prior to September 7, 2000. No Quebec exhibits were found unacceptable for quantitative results since there was no reviewable data.) Problems identified resulted from inconsistent or poor records, unsuitable data on the instrument printouts, or from failure to follow standard procedures relating to quality control.

Where Health Canada attempted to re-perform the relevant calculations on the 65 quantified results based upon the available data from instrument printouts, a quantification result was considered unacceptable if:

(a) the reported result was outside the acceptable range. The acceptable range is defined by using the reviewer's

calculated result, plus or minus 15% (e.g. if the reviewer's calculated result was 60%, the acceptable range was 51% to 69%)[14], or;

(b) there were variations from the standard operating procedures that had a significant impact upon the quantitative result.[15]

I am advised that it is difficult to determine how great the variance is for some of the unacceptable quantifications. For example, the analyst's notes did not always permit a determination as to how much liquid the sample was dissolved into, which affects the calculations to be made.

In summary, of the 65 Ontario quantified results with reviewable data, 13 were identified as unacceptable by the above criteria. 12 related to alleged hard drugs and one related to alleged cannabis. Three of the hard drug quantifications related to certificates also found to be unacceptable in identifying the substance involved. The remaining quantifications, one relating to cannabis and nine relating to hard drugs, were found to be acceptable for identification of the substances involved.

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[14]Dr. Mayer concluded that the 15% rule is a reasonable one that benchmarks favourably with the approach used in this field. It did not introduce a bias to the review process, since the certificates that are deemed doubtful, based on the 15% criterion, report results that are different from the re-calculated quantification by a much larger margin. The re-calculated quantification was generally found to be different from that reported by the analyst by a factor of 10. Four hard drug quantifications and one cannabis quantification fell outside the acceptable range.

[15]Dr. Mayer concluded that quantifications were questionable and deemed unacceptable due to serious deviations from the approved methods for these analyses (five hard drug certificates) and due to errors in identification of the substance under examination (three hard drug certificates).

SUMMARY OF HEALTH CANADA'S REVIEW

A. Questionable Certificates pertaining to the Identity of the Substance

This analyst issued 16,988 certificates between December 1988 and March 8, 2001. 7,936 cannabis certificates were issued for Ontario. 8,712 hard drug certificates were issued for Ontario. 340 certificates were issued for Quebec, of which 153 related to cannabis and 187 to hard drugs.

Health Canada has concluded that 192 certificates are questionable. These are allocated as follows:

	Total certificates	Questionable
Hard drugs–February 6, 1996 to March 8, 2001:	3540	151
Hard drugs–January 10, 1991 to February 6, 1996:	3482	14
Cannabis– May 8, 1991 to March 8, 2001	7932	27

Only one of these problematic certificates was issued for Quebec.[16]

1,690 hard drug certificates issued prior to January 10, 1991 and four cannabis certificates issued prior to May 8, 1991 cannot be reviewed.

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[16]This was a hard drug certificate issued within the period January 10, 1991 to February 6, 1996.

B. Questionable Quantitative Analyses

This analyst certified 1,595 quantification results between December 1988 and March 8, 2001. 118 related to alleged cannabis and 1,477 related to alleged hard drugs. Two of the hard drug quantifications concerned Quebec exhibits.

Health Canada has concluded that 13 quantifications are questionable, 12 of which related to hard drugs and one related to cannabis. All of these concerned Ontario exhibits.

1,527 quantifications performed prior to September 7, 2000 and three quantifications performed thereafter cannot be reviewed.

TASK OF TRACING CERTIFICATES TO PARTICULAR CASES

During the material time frame, approximately 71 law enforcement agencies potentially submitted exhibits for testing by this analyst. There is a record kept by Health Canada of all certificates issued since December 1988. However, the certificates do not identify, on their face, the case or accused to which they relate. This approach of maintaining anonymity was designed to enhance the objectivity of the analysis. However, it does create a problem in locating the names of the accused involved in any problematic certificates.

The certificates do identify the date of submission or testing and the police force and/or officer that submitted exhibits for testing. Each certificate bears a number, as do the exhibits examined.

Police forces do not have databases that permit retrieval of the certificates based upon these numbers. Police forces would have to search through their case files to try to locate the files to which problematic certificates relate, based upon the date of submission or testing and the officer identified.

The Department of Justice generally retains its files relating to each prosecution. However, this is not invariably the case. Many cases at Old City Hall in Toronto were conducted on the basis of the police confidential instructions, commonly known as "dope sheets." No separate Crown files were created in relation to these cases. Again, within the Department of Justice, there is no database that permits retrieval of the certificates based upon certificate or exhibit numbers. The Department of Justice files will not necessarily include a copy of the certificate of the analyst. Originally the certificate will have been provided to the police by DAS and a copy served upon the accused. The certificate is then either filed in a court proceeding or retained by the police. A photocopy of the certificate may be included within the prosecution brief prepared by the police, but this is not always the case. It is unlikely the prosecution brief will ever contain the analyst's notes or any printouts. These are rarely sought by the defence or produced for the prosecution files.

THE ABSENCE OF SUBSTANCES FOR CURRENT TESTING

The unconsumed portion of the substances submitted by the police to the DAS for testing are returned to the police when testing is completed. Generally, the substances are held by the police until the trial and appellate remedies have been exhausted, and thereafter the substances are destroyed. Destruction should only be carried out with the approval of Health Canada. As a general rule, substances pertaining to current or pending criminal cases continue to exist.

Health Canada has set up a webpage search function to enable prosecutors, police officers and/or defence counsel or accused to input specific exhibit numbers (as would appear on certificates) to ascertain whether they are potentially affected by the problems identified in this report. All exhibits contained in certificates issued by the subject analyst, whether identified as problematic or not, are retrievable through this search function.

On April 19, 2001, Health Canada sent a Bulletin to Law Enforcement Agencies in Ontario, advising that before proceeding with the destruction of any seized drug or exhibit, the police should first conduct a search on the webpage to verify whether or not the exhibit is on the list of those exhibits potentially affected. If the exhibit is not identified by the webpage search, then the police are instructed they may proceed with the destruction, following the usual procedure. Otherwise, it is requested that destruction be suspended until further notice. It is also suggested that the police inform Crown counsel where the exhibit is on the list of potentially affected exhibits and that the exhibit is still available for re-analysis.[17]

THE ISSUES FOR DISCUSSION

A. General

What steps have been taken or undertaken by the Department of Justice to fairly and expeditiously address potential prejudice to affected accused? What further steps should be taken?

On April 19, 2001, the Department of Justice issued a press release outlining some

[17]The webpage is located at www.hc-sc.gc.ca/expo.

steps already taken to address this issue. The press release is attached as Appendix C. The press release reflects, amongst other things, that the Department of Justice's highest priority is to identify any persons in custody as a result of a drug conviction or pending trial of a drug case who might be affected by the certificates in question. Some additional steps taken by the Department of Justice, referred to later in this report, have been taken since April 19, 2001.

In addressing the appropriate steps to be taken by the Department of Justice to address these issues, it is useful to distinguish between three situations:

(a) *Cases pending before trial courts*: This category relates to persons either under investigation or who are accused in cases that remain before the trial courts.

(b) *Cases where appellate proceedings are pending*: This category relates to persons already found guilty, who have initiated appeals against their convictions in a timely way.

(c) *Cases no longer "in the system"*: This category relates to persons found guilty or who pleaded guilty, who have not initiated timely appeals against their convictions or who have unsuccessfully appealed against their convictions.[18]

[18]Some may have exhausted all appellate remedies. Others may have exercised some but not all of their statutory appellate remedies (for example, unsuccessfully appealed to the Ontario Court of Appeal from their convictions on indictable offences but not sought leave to appeal to the Supreme Court of Canada).

B. Issues relating to Certificates for Quebec

340 of the certificates issued by the subject analyst were for Quebec. In the years 1994 and 1995, Quebec had a backlog of drug cases requiring analysis and turned to Ontario for assistance. Only one of these certificates has been found by Health Canada to be problematic. However, as earlier noted, only a limited review of hard drug analyses has been conducted for certificates issued between May 8, 1991 and February 6, 1996, given the destruction of instrument printouts.[19] I have been advised that in Quebec, drug prosecutions are conducted by both the federal and provincial governments. Federal prosecutions are generally only conducted respecting R.C.M.P. investigations. None of the certificates for Quebec appear to relate to R.C.M.P. investigations. The Department of Justice has provided the list of Quebec certificates to the office of the Attorney General of Quebec and has notified that office that one of these certificates has been identified as unacceptable by Health Canada. Accordingly, I am advised that my recommendations respecting the certificates for Quebec are not being sought by the Minister of Justice, although applications relating to Quebec certificates made under section 690 of the *Criminal Code*[20] or applications for pardons (addressed later in this report) may be governed by the same policies discussed here.

CASES PENDING BEFORE TRIAL COURTS

The Department of Justice has indicated that all full and part-time prosecutors have been instructed to identify those current cases involving any certificates issued by the analyst in question (whether or not identified as problematic by Health Canada) and to

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[19]As well, no review of the two quantitative analyses of alleged hard drugs done for Quebec can be performed.

[20]R.S.C. 1985, c.C-46, as amended.

place no reliance upon those certificates. Where an analysis and identification of the substance in question is desired by the prosecution and sufficient quantities of the substance remain to permit retesting, the substance is to be submitted to Health Canada for retesting on an expedited basis. The reasons for retesting are to be disclosed to the defence. I assume that the problematic features of a specific certificate will also be disclosed to the defence, where problems have been identified. Where an analysis of the substance is essential to the prosecution and insufficient quantities of the substance remain to permit retesting or otherwise in the discretion of the prosecution (e.g. for certain summary conviction offences), the charges will be stayed. Where an accused desires to plead guilty to a drug offence prior to obtaining disclosure of a certificate issued by the subject analyst, the accused or, where applicable, his/her counsel shall be advised of the problematic certificate before any guilty plea is accepted.

In my view, these steps undertaken by the Department of Justice to address cases pending before trial courts are appropriate. With full disclosure of the situation, defence counsel representing their clients in current cases can evaluate what approach should be taken to issues arising out of these certificates and act accordingly.

CASES WHERE APPELLATE PROCEEDINGS ARE PENDING

The Department of Justice has indicated that Crown appellate counsel have been instructed to identify those cases pending before appellate courts involving any certificates issued by the analyst in question (whether or not identified as problematic by

Health Canada) and disclose the situation to the defence in a timely way. Defence counsel may seek to tender the evidence of the situation as fresh evidence on appeal. It would appear that the Department of Justice must also consider whether, in the circumstances of each case, it should resist the appeal, consent to a new trial being

ordered or to an acquittal or stay.

Where the substance is still available, as it generally will be pending an appeal, then it may be open to the Crown to arrange for a new analysis to be conducted and to make application for leave to introduce the results, if positive, before the appellate court. Alternatively, the availability of positive results obtained through retesting might instead be tendered by the Crown at a new trial, if ordered by the court. Of course, either way, the defence will have a full opportunity to challenge the results of any retesting, if relied upon by the Crown. In any event, the admissibility of fresh evidence on appeal, whether tendered by the Crown or defence, and the ultimate disposition on appeal is appropriately left to the Court of Appeal to decide. Having said that, I do have recommendations as to how the Department of Justice should respond to appeals where issues pertaining to problematic certificates are raised. In the least, Crown appellate counsel should facilitate, through an agreed statement of facts, the presentation of the newly discovered situation to the Court of Appeal for its consideration. As well, in some circumstances, the Crown should consent to appellate relief[21] where the impugned certificate was central to the conviction. Guidelines as to how the Crown should respond to such appeals are more fully developed later in this report.

CASES NO LONGER IN THE SYSTEM

A. Types of Certificates to be Considered

Health Canada has identified problematic certificates, some of which obviously must relate to persons convicted of drug offences whose cases are no longer before the courts in that their appeal remedies have been exhausted or the time for appeal has expired. (The

[21]Indeed, I am advised that in one recent appeal, the Crown invited the court to set aside the conviction and enter a stay based upon a problematic certificate.

number of identified problematic certificates pertaining to alleged hard drugs and cannabis has earlier been broken down under the applicable time periods.) It is reasonable to assume that some of the defective certificates relate to charges which were withdrawn or stayed, or upon which the accused were acquitted. My concern is to address those cases where persons either pleaded guilty or were found guilty respecting offences to which these problematic certificates relate.

As well, as earlier outlined, the current unavailability of any supporting data for hard drug or cannabis testing prior to specified dates in 1991 and the current unavailability of instrument printouts pertaining to hard drug testing between January 10, 1991 and February 6, 1996 prevent a determination, in some circumstances, as to whether certificates are problematic. For the period 1988 to 1991, there is simply no basis from which it can be determined that the certificates issued in that timeframe are or are not reliable.[22] For hard drug certificates issued between January 10, 1991 and February 6, 1996, the absence of instrument printouts significantly undermines any ability to determine that the certificates are reliable. Where full documentation is available, the overall percentage of identified errors was small, in the area of one or two percent. In my view, it would be wrong to assume, because of the unavailability of some or all of the supporting documentation, that all the certificates issued from 1988 to 1991 and all the hard drug certificates issued between January 10, 1991 and February 6, 1996 were valid. In my opinion, it is reasonable to assume, based upon the errors that have been identified, that some mistakes may have occurred in the issuance of those certificates. Accordingly, my recommendations must also address those found guilty or who pleaded guilty respecting offences involving certificates which are not demonstrably flawed. Finally, my recommendations must address those situations where questionable quantitative analyses may have affected the convictions or sentences of accused persons.

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[22]That is, absent other evidence in the case that bears upon the identity of the substance.

B. Certificates shown to be Problematic

Overview

I propose to deal next with those certificates identified as problematic relating to cases no longer in the system (i.e. the time for appeal has expired or appeal rights have been exhausted). As earlier indicated, the Department of Justice has undertaken to endeavour to individually identify each of the accused to whom these problematic certificates pertain. If these accused were found guilty of related drug offences, the Department of Justice has further undertaken to disclose the nature of the problem to these individuals, if they can be ascertained, or their counsel and to outline the available remedies that they might pursue. It is recognized that there are practical impediments to identifying and contacting every accused to whom these problematic certificates relate. As earlier indicated, Health Canada records do not identify the accused or the case name. Based upon the date of submission to Health Canada of the exhibits, and the name of the submitting officer and police force, the police may be able to track the name of the accused and last known address. As well, where available, Crown files may facilitate this task. Both police and Crown files suffer from the same deficiencies: they are not organized in accordance with certificate or exhibit numbers, they may not contain specific reference to the certificate or exhibit numbers and, in some instances, a police or Crown file may no longer exist. Indeed, in many less serious cases, there would have been no Crown file independent of the police file or "dope sheet" as it is commonly known.

To facilitate the identification of accused to whom problematic certificates relate, Health Canada has created a database that permits any interested party to initiate a search, if they have available a certificate or exhibit numbers. This would enable such parties to determine if their case involves a problematic certificate. However, most accused may not have this information and their defence counsel's files may not contain this information either. Nonetheless, I recommend that arrangements be made to enable the Criminal Lawyers' Association to disseminate the exhibit numbers pertaining to problematic certificates to its membership through its own website to facilitate the identification of affected parties.

Disclosure to Accused

What information should be provided by the Department of Justice to accused to whom problematic certificates relate? I recommend the following be provided in writing:

(a) A copy of the certificate;
(b) Disclosure of the situation generally identified by the Health Canada review, and the specific problematic features of the relevant certificate;
(c) The available remedies for an accused who believes that his/her rights have been affected;
(d) How these remedies may be exercised;
(e) The name, address and telephone number of a contact person at the Department of Justice who will address issues arising out this situation.

Where the last known address of the accused is not contained in the police or Crown files, the Department of Justice should make reasonable efforts to ascertain the address of the accused to enable him/her to obtain notification. To the extent to which accused

cannot be matched to problematic certificates or their addresses cannot be ascertained through reasonable efforts, a public notice of the problem may bring these individuals forward. The nature and content of this public notice will be discussed later in this report.

Available Remedies

Once the convicted person has been notified and disclosure made, it is important to consider what remedies may be available to those accused convicted of offences to which defective certificates relate. I propose to review those remedies that may be available to a convicted person whose case is no longer in the system. The remedies may depend on whether the offence was proceeded with summarily or by indictment, whether appellate proceedings were previously taken or exhausted and whether or not the accused remains in custody. There are three basic remedies available to an aggrieved party whose case is no longer in the legal system, namely: Appellate remedies, Applications under section 690 of the *Criminal Code* and Applications for pardons and remissions.

Rather than anticipate every scenario that may obtain, I will set out the potential remedies available to an aggrieved party, a protocol for applying for these remedies and recommended guidelines as to how the Department of Justice should respond to applications for relief.

1. Appellate Remedies

For summary conviction offences, an appeal as of right against conviction lies to the Superior Court.[23] A further appeal lies, with leave, on questions of law alone to th/e

[23]Sections 812 and 813 of the *Criminal Code*.

Ontario Court of Appeal.[24] For indictable offences, an appeal as of right lies to the Ontario Court of Appeal on questions of law and, with leave, upon questions of fact or mixed law and fact.[25] Where leave to appeal is required in the Ontario Court of Appeal, it need generally not be obtained in advance of the hearing of the appeal itself. Very limited further appellate relief lies to the Supreme Court of Canada on questions of law. With one exception, leave to appeal must first be obtained from the Court, which sparingly grants such leave, particularly in summary conviction matters. A dissent on a question of law in the Ontario Court of Appeal respecting an indictable offence entitles the appellant to appeal to the Supreme Court of Canada as of right.[26]

For summary conviction offences, an appeal against sentence may also be initiated.[27] For indictable offences, an appeal against sentence, with leave, may be commenced.[28] Where bail pending such an appeal is sought, leave must be obtained in advance of the hearing of the appeal.[29] Further limited appellate remedies respecting sentence need not be elaborated upon here.

Each appellate remedy must be initiated within fixed time periods. Extensions of time within which to appeal may be granted by the Court.[30] Generally, though not invariably, an accused seeking an extension of time within which to appeal, must demonstrate a *bona fide* intention to appeal within the appeal period. As well, the court will consider the likelihood of success on appeal, prejudice to the respondent occasioned by the delay and the reasons for the delay, all directed to whether the interests of justice favour an

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[24]Section 839 of the *Criminal Code*.
[25]Sections 673 and 675(1)(a) of the *Criminal Code*.
[26]Section 691(1) of the *Criminal Code*. See also section 41 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended which governs appeals to the Supreme Court of Canada in summary conviction matters.
[27]Section 813 of the *Criminal Code*.
[28]Section 675(1)(b) of the *Criminal Code*.
[29]Section 679(1)(b) of the *Criminal Code*.
[30]See, for example, section 678(2) of the *Criminal Code*.

extension of time. [31]

Appeals from a Guilty Plea

An appeal against a conviction arising from a guilty plea may be taken. In such a case, the appellant seeks to withdraw the guilty plea on appeal. In practice, the appellant assumes a heavy burden in demonstrating that the conviction should be set aside. Generally, affidavit evidence showing cogent reasons to set aside the conviction is required. Such evidence might establish, for example that the accused did not understand the nature of the offence or its essential elements, did not enter a voluntary and unequivocal plea of guilt or, on the facts offered in support of the charge, could not in law have been convicted of the offence charged. Although not invariably required, evidence is usually presented that establishes that the appellant has a defence on the merits.[32]

2. Section 690 of the *Criminal Code*

Section 690 provides as follows:

> **Powers of minister of justice** – The Minister of Justice may, on an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,
>
> > (a) direct, by order in writing, a new trial or, in the case of a person under sentence or preventive detention, a

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[31] See, for example, *R. v. Scheller (No. 2)* (1976), 32 C.C.C.(2d) 286 (Ont. C.A. in Chambers); *R. v. Hetsberger* (1979), 47 C.C.C. (2nd) 154 (Ont. C.A. in Chambers); *R. v. Henry* (1989), 52 C.C.C. (3d) 470 (Man. C.A.)

[32] See *R. v. Adgey*, [1975] 2 S.C.R. 426 and the dissenting judgment of Laskin J. where the authorities are reviewed at pages 438-440; *R. v. Rajaeefard* (1996), 104 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Djekic* (2000), 147 C.C.C. (3d) 572 (Ont. C.A.); *R. v. T. (R.)* (1992), 17 C.R. (4th) 247 (Ont. C.A.).

> new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
>
> (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
>
> (c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

The Minister of Justice may, under the above provisions, with respect to indictable offences only, direct a number of remedies, including ordering a new trial, or referring the matter to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person. The section does not articulate the circumstances under which the Minister may so act. The Department of Justice has published a booklet that describes the nature of the remedy, how the process of assessing applications generally works and what the Minister of Justice has the power to do.[33]

The booklet reflects that section 690 should be treated as a *special* remedy to be used in *exceptional* circumstances where the Minister feels that there may have been a miscarriage of justice, to correct that injustice after the ordinary passage of the case through the courts is over. An applicant may apply if he or she has exercised all his or her rights of appeal to the provincial court of appeal and to the Supreme Court of Canada. The policy of the Minister is that the application must raise *new* and *significant* information which casts doubt on the correctness of the conviction. The process is not

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[33]See *Applications to the Minister of Justice for a Conviction Review Under Section 690 of the Criminal Code*, available at http://canada.justice.gc.ca/en/dept/pub/amjcr/main.html

meant to be a substitute for an appeal. Information will be considered *new* if it was not examined by the courts during the trial or if the accused became aware of it after all court proceedings were over. It will be considered *significant* if it is reasonably capable of belief, it is relevant to the issue of guilt and if it could have affected the verdict if it had been presented at trial.

Usually a Department of Justice lawyer will assess the application. However, in exceptional cases, such as when the conviction being reviewed was obtained by a federal prosecution, outside counsel may be asked to assess the application or provide advice on it. Indeed, I am advised that the Department's policy at the present time is to use outside counsel on section 690 applications when the prosecution in question was conducted by the Federal Prosecution Service.

When a completed application is received, it is first assessed by a Department of Justice lawyer[34] to determine if it reveals new and significant information that was not available at trial or on appeal and that could have affected the outcome. The matter may then proceed to investigation. When the relevant information has been gathered, an investigation brief is prepared, which is provided to the applicant for review and comment. Thereafter, a report containing the application, the investigation brief together with the applicant's comments and the Department of Justice's recommendations will be prepared for the Minister to review.

The adequacy and timeliness of section 690 in rectifying wrongful convictions has been the subject of much debate. Indeed, the Minister has engaged in a public discourse on that subject.[35] My mandate does not extend to an evaluation of section 690 of the

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[34]Subject to the exception noted immediately above.

[35]See, for example, *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code: A Consultation Paper 1998*, published by authority of the Minister of Justice and Attorney General of Canada, available at http://canada.justice.gc.ca/en/cons/amj/coverre.html

Code. My only purpose is to point out that if may be utilized here to rectify the identified problem.

Although the policy booklet states that an applicant may only apply if he or she has exercised all his or her rights of appeal to the provincial court of appeal and to the Supreme Court of Canada, I have been advised that the Department of Justice review group is prepared to assess each case on its merits and show some flexibility in this regard. For example, if a significant period of time has elapsed since the expiry of the time to appeal, then it may be more appropriate that a section 690 application be reviewed without requiring that all appellate remedies be exhausted. This is of importance here, since it would be cumbersome to insist that, in all cases, an accused apply for leave to appeal to the Supreme Court of Canada from his or her conviction, arising out of a flawed certificate, before a section 690 application would be considered by the Minister of Justice.

3. Pardons and Remissions

Section 748 of the *Criminal Code* permits the Governor in Council to grant a free pardon or a conditional pardon to any person who has been convicted of an offence. Where a free pardon has been granted to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon was granted. Section 748.1 also permits the Governor in Council to order the remission, in whole or in part, of a fine or forfeiture imposed under an Act of Parliament. Sections 748 and 748.1 extend to both indictable and summary conviction offences.

In addition to the pardon provisions of the *Code*, application may be made to the Solicitor General of Canada for a pardon pursuant to the *Criminal Records Act*.[36] The

[36]R.S.C. 1985, c. C-47.

effect of the pardon is articulated in section 5 of the Act. The *Criminal Records Act* provides that such pardons can only be granted after the passage of specified time periods, depending upon whether the offences were proceeded with by indictment or summarily. Unlike pardons granted by the Governor in Council, applications for these pardons are generally not motivated by concerns as to the correctness of the convictions but, rather, by the desire to purge a rehabilitated offender's record.

Summary Conviction Offences

Some of the problematic certificates are likely to relate to accused found guilty of simple possession, an offence ordinarily prosecuted summarily. As I pointed out earlier, offenders convicted of a summary conviction offence may not apply to the Minister of Justice under section 690 of the *Criminal Code* for relief. While these offenders may apply for an extension of time to appeal to the Summary Conviction Appeal Court, this may be a relatively expensive and time consuming approach when considered against the nature of the offence and the pealty imposed. Therefore, some offenders convicted of summary conviction offences may well consider it more appropriate to seek a pardon.

Fresh evidence

Whether an accused seeks relief through the appellate process or by resort to sections 690 or 748 of the *Criminal Code*, the application will be based upon the newly discovered evidence that the certificate pertaining to his or her case is problematic. Accordingly, some consideration need be given to how newly discovered evidence is traditionally addressed.

In *Palmer v. The Queen*[37], the Supreme Court of Canada articulated the four-pronged

[37](1979), 50 C.C.C. (2d) 193 (S.C.C.).

test for admission of fresh evidence on an appeal against conviction:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in a civil case.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief.
>
> (4) It must be such that if believed, it could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result.

Where the Crown has made disclosure of a defective certificate and the appellate remedy is pursued, the first and third requirements for admission will generally be satisfied. The critical issue for the Court of Appeal is whether the second and fourth requirements have been satisfied, having regard to whatever evidence may be available for consideration.

Inadvertent Non-Disclosure by the Crown

The failure to disclose the flaws in the problematic certificates may arguably also be characterized as inadvertent non-disclosure by the Crown. However, since the Crown's disclosure obligation is only triggered upon a request by the defence, it is debatable whether these cases truly engage a "disclosure-based" analysis. However, the jurisprudence pertaining to inadvertent non-disclosure remains helpful in determining how the government should now respond to its discovery of these problematic certificates.

In *R. v. Dixon*[38] and its companion cases, the Supreme Court of Canada considered the test to be met by an appellant who seeks to set aside a conviction as a result of inadvertent non-disclosure. The analysis to be employed is summarized by the Ontario Court of Appeal in *R. v. Babinski*[39]:

> (1) The appellant must demonstrate a violation of his right to disclosure by showing that there is a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision that could have affected the conduct of the defence.
>
> (2) The appellant must demonstrate on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose by showing that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. This involves a two-step analysis in the appellate court:
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> > (i) if the appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial must be ordered.
> >
> > (ii) even if the evidence on its face does not affect the reliability of the conviction, the appellate court must consider the overall fairness of the trial process. This will require the court to assess, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to gather additional evidence that could have been available to the defence had the information been disclosed. In considering the overall fairness of the trial process, the court will take into account defence counsel's diligence in pursuing disclosure from the Crown. A lack of due diligence is a significant factor in determining whether the non-

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[38](1998), 122 C.C.C. (3d) 1 (S.C.C.).

[39] (1999), 135 C.C.C. (3d) 1 (S.C.C.) per Rosenberg J.A. at 16-17.

disclosure affected the fairness of the trial process.

As noted by Rosenberg J.A. in *Babinski* at p.19, the issues as to whether the undisclosed information affected the reliability of the conviction or the overall fairness of the trial process are similar to the fourth element of the test for admission of fresh evidence, requiring the court to determine whether the fresh evidence is such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. Indeed, I understand that the fresh evidence criteria are applied by the Minister of Justice as part of her determination whether she should grant relief under section 690 of the *Criminal Code*.

Submissions by the Criminal Lawyers' Association

The Criminal Lawyers' Association (CLA) made forceful submissions orally and in writing on behalf of accused persons potentially affected by this situation. Underlying these submissions was the view that the state must demonstrate in unequivocal terms that it accepts responsibility for its employee's conduct and that it will act generously in ensuring that wrongful convictions are rectified. The premise that should motivate the state's response to this dilemma is that all of this analyst's certificates should be treated as "blank pieces of paper", whether demonstrably problematic or not. It would be a fallacy to assume that a proper analysis would have yielded proof of the illicit character of a substance.

Accordingly, the CLA submitted that steps should be taken to bring this situation to the attention of any person potentially affected. Full disclosure should be made in all current cases, all possible efforts made to identify the accused in past cases should be taken and the entire situation well publicized. Any person able to show that this analyst was involved in their case should be assisted in obtaining relief.

The CLA generally favoured resort to the appellate courts as the most convenient and appropriate remedy. Where cases are no longer in the system, the Crown should consent to an extension of time within which to appeal. The costs of transcripts should be borne by the federal government. The CLA was especially concerned that the Ontario Legal Aid Plan not be further burdened by assuming these expenses.

Where an accused initiates an appeal, the Crown should generally consent to admission of fresh evidence as to the problem and further consent to an acquittal being entered. Where there is a reasonable prospect of conviction, the Crown may instead consent only to a new trial, without prejudice to the accused's ability to seek an acquittal. It would be unfair for the Crown to base a new prosecution upon a different theory of liability than originally presented. The CLA suggested that the Crown should only oppose the introduction of fresh evidence and the setting aside of a conviction if the trial record demonstrates that the verdict was inevitable. Although the Crown could also resist the appeal on the basis that retesting of the substance, where it is still available, or the assessment of the analyst's original work confirms the identity of the substance, these issues are more appropriately explored at a new trial. After all, the appellate courts have limited ability to make findings of fact on disputed evidence.

Where appellate remedies have been exhausted, the same generous approach should be taken to applications for alternative relief.

In the CLA's view, distinctions should not be drawn based upon the conduct of the defence at trial. Similarly, a guilty plea should not affect the applicable approach. Even for guilty pleas, the court relies upon the certificate as proof. The defence detrimentally relies upon the accuracy of these certificates and is encouraged not to waste time litigating unnecessary issues. Fairness and logic dictate that we simply do not know what the substance was. Subject only to those circumstances where a guilty plea was entered

even before any certificate of the analyst was issued, it should not matter what plea was entered.

Submissions by Crown Prosecutors

Crown prosecutors at the Department of Justice also provided me with written and oral submissions pertaining to these same issues. Although there was some common ground between Crown and defence counsel, the Crown prosecutors suggest a somewhat different approach.

In their view, the issue must be seen in the context of the issues that generally arise in drug prosecutions and the trial remedies available to the defence to challenge the accuracy of drug analysis.

The *Controlled Drugs and Substances Act* permits the defence to challenge the accuracy of the certificate tendered. Evidence to the contrary may be introduced. Leave may be sought to cross-examine the analyst. The testing procedures are well publicized. As well, the defence is at liberty to seek production of the lab notations and any instrument printouts pertaining to the analyst's conclusions.

Apart from statutory procedures available to challenge the accuracy of certificates, in the vast majority of drug cases, the identification of the seized drug is not a live issue. Some offences, such as conspiracy or trafficking in a substance held out to be a controlled substance, require no proof of the analysis and identity of a seized substance. More commonly, proof of the substance is an element of the offence. However, in most cases, the surrounding circumstances make clear that the accused believed that they were in possession or control of a controlled substance--and that such individuals are almost always right. The drug trade flourishes, despite the absence of certification of the

substances as they are exchanged. Those who control or possess drugs take affirmative steps to ensure that they are acquiring the drugs they believe they are paying for. Any mistake as to the precise composition of the drugs traded in would not, in any event, absolve the accused from liability. There will of course be circumstances where an individual who possesses a substance may be the victim of a fraud and accordingly have available a legal, albeit not a moral, defence. The point made here was that these cases will be few and far between. Crown counsel noted that a defence counsel advised by his or her client that the substance is not a controlled substance should not formally concede the identity of the substance. In fact, their ethical and professional responsibilities compel them not to make that concession. Accordingly, where appropriate, these cases are fully litigated. Indeed, Crown and defence counsel anecdotally advised me that accused often show significant insight in whether an exhibit will ultimately test positively as a controlled substance.

In this context, Crown prosecutors submitted that the burden on a convicted offender no longer in the system should be a high one in seeking to displace a guilty plea or finding of guilt made at trial, even where certificates have been identified as problematic. Absent some indication that the certificate was challenged at trial, it is reasonable to infer that there was no serious issue as to the nature of the substance. In order to set aside a conviction, the accused should establish both that the conviction rested on the problematic certificate and that some credible basis exists for believing that the conviction was wrong. Absent exceptional circumstances, guilty pleas should not be set aside. After all, by pleading guilty, an accused is admitting having done that with which he or she is charged.

As for those cases involving certificates not shown to be problematic, Crown prosecutors submitted that, again, the defence was entitled to challenge the accuracy of these certificates at trial. In the absence of such a challenge, a convicted offender would

have to show that the conviction rested on the certificate and that some credible basis exists for believing that the substance was not in fact a controlled substance as alleged and proven at trial. Again, an even heavier onus should exist regarding guilty pleas where there has been no showing that the certificate is problematic.

Finally, Crown prosecutors noted that many of these certificates are likely to have pertained to summary conviction offences. Section 690 is unavailable. An extension of time within which to appeal to the Summary Conviction Court may be a relatively expensive and time-consuming approach when considered against the nature of the offence. Accordingly, Crown prosecutors suggested that a pardon may be a more appropriate approach to these cases, should a remedy be appropriate. (Earlier in this report, I made a similar observation.)

Commentary

Before attempting to resolve these competing views, some preliminary comments are warranted.

I accept that a relatively small number of cases may involve a genuine issue as to the identity of the substances seized by police. I further accept that, in a number of those cases, the defence could be expected to challenge the accuracy of the certificate at trial. Accordingly, the failure to challenge the accuracy of the certificate at trial should play some role in evaluating the government's response to an application to reopen a conviction. However, I do not believe that the failure to tender evidence to the contrary or seek leave to cross-examine the analyst should be determinative as to whether relief should be granted. This view is derived from the jurisprudence that imposes some limits upon the ability of the defence to tender such evidence or to obtain leave to cross-

examine the analyst at trial.[40]

Section 51(1) of the *Controlled Drugs and Substances Act* confers a discretion upon the trial judge as to whether leave to cross-examine the analyst should be granted. A similar provision, involving the breathalyzer certificate, was considered by the Alberta Court of Appeal in *R. v. Davis*[41]. Belzil J.A. described the test which has also been applied to Certificates of Analyst in drug cases at page 56:

> In the exercise of this discretion the trial judge must bear in mind, on the one hand, the considerations of expediency in the prosecution of these social offences which Parliament obviously intended where it enacted provisions for proof of the Crown's case by certificate evidence. It would be contrary to that Parliamentary intent to require attendance of the technician on unfounded suspicion merely to enable the defence to engage in a broad fishing expedition in which it is normally entitled in cross-examination. The trial judge must also bear in mind on the other hand the right of the accused to make full answer and defence.
>
> Within these limits, leave should not be granted unless there is an indication in the evidence or in an affidavit or in the submissions and undertakings of counsel, of a material irregularity in the actual testing procedure followed by the technician in the instant case which if substantiated might provide a legal basis for a reasonable doubt as to the accuracy of any evidentiary statement in the certificate. An irregularity which could not in law affect the result of the case would not warrant leave. It should also be shown in support of the application that the evidence sought is within the peculiar knowledge of the technician qua technician in the case.

In *R. v. Howden, supra,* Dambrot J. regarded this approach as an appropriate balancing of the accused's right to make full answer and defence and society's interest

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[40]This jurisprudence is outlined in the judgement of Dambrot J. in *R. v. Howden* [1997] O.J. No. 4727 (Gen.Div.).

[41] (1983), 4 C.C.C. (3d) 53 (Alta.C.A.).

balancing of the accused's right to make full answer and defence and society's interest that analysts not be required to attend every drug trial at the whim of the defence. He opined that this carefully crafted balance cannot be circumvented by the simple expedient of serving a subpoena on the analyst.

Earlier in this report, I referred to the Supreme Court of Canada's interpretation of "evidence to the contrary."[42] In the context of section 51(1) of the *Controlled Drugs and Substances Act*, it has also been said that "evidence to the contrary must be evidence which calls into question the correctness of the very analysis which is being tendered by the Crown.[43]"

It is unnecessary for me to determine under what circumstances leave to cross-examine the analyst should be granted or when testimony will be admitted or excluded as evidence to the contrary. Suffice it to say, even where the defence seeks to challenge the accuracy of the certificate, it may not always be permitted to cross-examine the analyst or tender evidence which qualifies as evidence to the contrary. Further, where the accused instruct their counsel that they were not in possession or control of the alleged substance, those accused may not be well situated to provide admissible evidence as to the identity of the substance. In these circumstances, even if the certificate is inaccurate, the accused may not be in a position to offer up evidence to leave the trier of fact with a reasonable doubt on that issue. Put simply, an overemphasis should not be placed upon the accused's failure to call evidence to the contrary or seek leave to cross-examine the analyst at trial in determining how the Crown should respond to applications to reopen convictions involving problematic certificates.

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[42](1981), 62 C.C.C. (2d) 97 (S.C.C.) at 105.
[43]*R. v. Howden, supra,* at 3.

Having said that, I am of the view that there is an important distinction to be drawn where the accused has entered a plea of guilt or made a formal admission at trial that the seized exhibit was a controlled substance. A plea of guilt is an admission as to each of the elements of the offence charged, including the identity of the seized exhibit(s). A formal admission in the course of a trial as to the identity of the seized exhibit(s) has similar effect. It obviates the need for strict proof of the identity of the substance. [44] Where no challenge is made to the accuracy of the certificate and, indeed, where the identity of the substance is admitted, there is no opportunity or need for the Crown to rectify any deficiencies in the analysis, had its flaws been exposed, through retesting or the tendering of other evidence that might support proof of the prosecution case.

The Criminal Lawyers' Association pointed out that guilty pleas or formal admissions would not likely have been made, had the problematic nature of the certificates been known. There is, nevertheless, a clear obligation on defence counsel to ensure that the client who enters a guilty plea does so only when the accused is prepared to admit both the factual and mental elements necessary to establish the offence. Crown prosecutors have drawn to my attention Rule 4.01(9) of the recently revised Rules of Professional Conduct, which states:

> Where, following investigation,
>
> (a) a lawyer for an accused or potential accused advises his or her client about the prospects for an acquittal or finding of guilt;
>
> (b) the lawyer advises the client of the implications and possible

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[44] *R. v. Ford* (2000), 145 C.C.C. (3d) 336 (Ont.C.A.).

sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea,

the lawyer may enter into an agreement with the prosecutor about a guilty plea.

Most drug offences require proof that a controlled substance was possessed or otherwise dealt with by the accused and that the accused knew that he or she was dealing with a controlled substance. Wilful blindness is generally tantamount to knowledge. It follows that, absent exceptional circumstances, a guilty plea involves a voluntary acknowledgement of these facts. It also follows that, absent exceptional circumstances, where the accused is represented by counsel, the accused's version of the relevant events was discussed and the accused was prepared to acknowledge these facts.

Sometimes, the accused pleads not guilty to the offence charged but formally admits that the seized substance was a controlled substance. Again, absent exceptional circumstances, it can be inferred that the accused was prepared to voluntarily acknowledge the identity of the substance and that the accused was in a position to do so. If the accused raises the issue of the accuracy of the certificate, defence counsel may be obliged to challenge the certificate, using whatever means may be reasonably available, including an application for the attendance of the analyst for cross-examination.

One American author, in an article addressed to defence counsel, emphasized the importance of being ready to challenge the Certificate of Analyst where the accused questions the identity of the substance. He said:

> ...[I]t is probably a rare case in which the narcotic nature of the substance seized will be a live issue at trial. It is certainly not unheard of, however, and you should be prepared to defend on these grounds if the defendant so requests and there is a basis upon which to challenge the...allegation that the substance in question is in fact a narcotic..."[45]

Obviously, in the interests of the administration of justice, steps should be taken to ensure that the accused whose cases are no longer in the system, were not improperly convicted as a result of a defective certificate. Indeed, it is for that reason that I earlier stated that the accused's failure at trial to call evidence to the contrary or apply for leave to cross-examine the analyst should not be determinative. However, where the accused has pleaded guilty or formally admitted the identity of the substance, different considerations apply. In my view, one should approach those cases on the basis that no relief should be readily granted on the basis of a flaw in the certificate, where the statements of the analyst contained in that certificate were of no apparent concern in the original trial process.

In saying that, I do not wish to preclude an accused who has pleaded guilty or made a formal admission from seeking relief in the appeal process. Obviously, on a proper evidentiary record, an appeal court may set aside a conviction, notwithstanding a plea of guilt or a formal admission. However, in my view, absent exceptional circumstances, the Department of Justice is entitled to resist applications for relief in these cases.

Recommendations pertaining to Problematic Certificates

1. It was conceded by the Criminal Lawyers' Association (and rightly so) that the accused should bear some onus of applying for relief, once notified of the problem. Put

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[45]David Hoose et al, *Defenses to Drug Offences*, Massachusetts Continuing Legal Education, Inc. 1999.

simply, many accused may have no interest in seeking any relief. Accordingly, the Department of Justice should be obligated to use reasonable efforts to identify and notify each accused convicted of an offence to which a problematic certificate relates. Any further obligation should only be triggered by a request by an accused for relief.

2. A protocol to facilitate applications for relief should be developed by the Department of Justice. This protocol should be provided to each accused convicted of an offence to which a problematic certificate relates. It should also be posted on the Department of Justice's website.

3. A form ("Notice of Intended Application") should be developed to assist accused persons and facilitate their access to potential relief.

4. The Notice should generally be filled out and signed by the accused or counsel.

5. The form should provide:

(a) the name of the accused;
(b) the date and place of conviction;
(c) the offences respecting which the accused was convicted;
(d) the sentences imposed and, if the accused remains in custody, the place of incarceration;
(e) the name of the judge with or without a jury;
(f) the certificate or exhibit numbers involved;
(g) if there was a plea of not guilty at trial, the position of the defence at trial pertaining to the identification of the substance allegedly involved. The position of the defence would include:

(i) whether the certificate was tendered in evidence;

(ii) whether the analyst testified and whether leave was sought to cross-examine the analyst;

(iii) whether any admissions were made pertaining to the identification of the substance;

(iv) whether the defence tendered evidence to the contrary;

(h) how, if at all, the new information about the problematic certificate was likely to have affected the result or the fairness of the trial process;

(i) if there was a plea of guilt at trial, the reasons for that plea of guilt and whether the applicant has a defence on the merits to the charge relating to the nature of the substance;

(j) the availability of any trial transcripts, if known[46], or reasons for judgment bearing upon these issues;

(k) where information outlined in the preceding paragraphs is not known, why it is not known.

6. The Notice of Intended Application should check off the relief sought. Relief sought might include:

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[46]For cases no longer in the system, the issue arises as to whether trial transcripts can now be obtained. If appellate proceedings were previously taken in relation to these cases, the trial transcripts would generally have been prepared and likely can be retrieved either from court files or perhaps from Crown or defence files. Where no appellate proceedings were previously taken, there may still be a preliminary inquiry transcript available. Otherwise, it must be determined whether the desired transcripts can now be prepared by court reporters.

Court reporters or monitors usually record trial testimony on tapes. I have been advised that the tapes are to be kept for fixed periods–depending upon the level of court. Apparently, many of these tapes pertaining to trials or guilty pleas conducted from 1988 on will remain available and the trial testimony can now be transcribed. However, this is not invariably the case, even where the tapes remain available. For example, in some jurisdictions, such as Toronto, Superior Court reporters purchase their own equipment and software. This means that, where those court reporters are no longer available, others may be unable to work from the original tapes and transcribe the trial testimony. Issues also arise as to how transcripts can be certified in the absence of the original court reporter and the ability to obtain a trial transcript quickly, given the workloads of court reporters generally and the priority which may be given to current cases.

(a) Summary conviction offences:

- A pardon
- Remittance of any fine paid
- Extension of time within which to appeal
- Setting aside the conviction on appeal and entering an acquittal or a stay

(b) Indictable offences

- Where appellate remedies have previously been taken, a new trial or appeal directed by the Minister of Justice
- Where appellate remedies have not previously been taken, an extension of time within which to appeal
- Setting aside the conviction on appeal and entering an acquittal, a stay or in the alternative a new trial
- A pardon
- Remittance of any fine paid

(c) Generally

- Release from custody, if applicable[47]

7. The Department of Justice should undertake to respond in a timely way to the intended application, advising the applicant whether any or all of the relief sought will be consented to, or where applicable, recommended to the Minister of Justice or the Governor in Council.

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[47]Where the *quantitative* analysis is problematic, appellate remedies as to sentence, including reduction of the custodial portion of any sentence, may be appropriate. See the discussion pertaining to quantitative analyses, below.

8. In determining whether any or all of the relief sought will be consented to or, where applicable, recommended to the Minister of Justice or the Governor in Council, the Department of Justice should be guided by the following factors:

(a) the present ability to conduct retesting of the substance and any retesting done pending the determination of any relief;
(b) the significance of the analysis to proof of the prosecution's case;
(c) the position of the defence at trial, including whether any admissions as to the identification of the substance were made or conversely, whether evidence to the contrary was tendered or leave to cross-examine the analyst was sought;
(d) whether the defence sought access to the analyst's notebooks or data analysis and whether such materials were then available;
(e) the seriousness or lack thereof of the offence;
(f) what sentence was served;
(g) whether there is a reasonable possibility that the defective certificate affected the outcome at trial or the overall fairness of the trial process;
(h) the availability of trial transcripts, or reasons for judgment bearing upon these issues.

9. Having set out these factors, the following approach should generally be taken to applications for relief where problematic certificates were tendered against accused who pleaded not guilty and did not formally admit the identity of the seized substance:

(a) the convictions are *prima facie* suspect. Put another way, *prima facie*, the applicant should be regarded as having met his or her onus of demonstrating that the new information could be expected to have affected the result;

(b) accordingly, in the absence of evidence independent of the certificate establishing that the defective certificate could not be expected to have affected the result, the

Crown should consent to, or recommend that, relief be granted;

(c) of course, the existence of trial evidence demonstrating that the verdict was inevitable, without any reliance upon the defective certificate, would entitle the Crown to resist an application for relief;

(d) absent exceptional circumstances, the Crown will be hard pressed to submit that the defective certificate could not be expected to have affected the result, where a transcript of the trial is no longer obtainable;

(e) where appellate proceedings are pursued and where the conviction must be set aside and the only issue remaining is whether an acquittal, stay or new trial should be ordered, the Crown should consider whether there is any reasonable prospect of a conviction now and, even if there is such a prospect, whether the public interest favours a retrial at this point. Many of the factors earlier listed should inform this decision;

(f) in a limited number of cases, the Crown may be in a position to retest the substance involved or otherwise validate the original analysis. Generally, though not invariably, the availability of such potential evidence is more relevant to whether a new trial should be sought and pursued, than to whether the conviction should be set aside.

10. Where agreement is reached between the applicant and the Department of Justice as to the appropriate relief, the Department of Justice should facilitate the obtaining of such relief in an expeditious and least costly manner. This may mean that the Notice of Intended Application is treated as adequate documentation for the purposes of an application for section 690 relief or a pardon. Or, this may mean that the Department of Justice waives the need for the applicant to file certain documentation normally required

by the appellate court.

11. Where the Department of Justice does not reach agreement with the applicant as to the appropriate relief, the applicant is of course free to pursue any relief he or she sees fit. Despite the absence of agreement, the Department of Justice should nonetheless facilitate any application for relief in a way not inconsistent with its ultimate position. Where transcripts are required and tapes remain available for transcription, the Department of Justice should assume the cost of transcripts, reasonably necessary for determination of the matter. Absent exceptional circumstances, the Department of Justice should not oppose an extension of time within which to appeal on the basis of delay, where the process has been initiated by the applicant in accordance with these protocols in a reasonably timely way.

12. In any appellate proceedings, the Department of Justice should facilitate, through an agreed statement of facts, the presentation of the new information to the court in an application to tender fresh evidence on appeal. In doing so, the Department of Justice is not precluded from submitting that the evidence should nonetheless not be admitted as fresh evidence for example, because it would not have affected the result.

13. Of course, in any appellate proceedings, the Department of Justice is entitled to insist upon proof of the facts supporting the application by affidavit(s) in accordance with the rules of practice. Indeed, the Crown is entitled to cross-examine on such affidavit(s). [48]

14. Where section 690 relief is sought by the applicant (and is opposed by the

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[48] I considered and ultimately rejected a recommendation that the applicant's Notice of Intended Application should invariably be supported by an affidavit. It is my hope that the Department of Justice and the defence bar can work together to streamline the process in appropriate cases and obviate the need for more time-consuming and expensive formalities. However, it may be in the applicant's interest to support his or her Notice with an affidavit in seeking appropriate consents from the Department of Justice.

Department of Justice), consideration should be given by the Minister of Justice to hiring outside counsel to assess the application and provide advice to the Minister on it, in keeping with the policy associated with the review of convictions conducted by the Federal Prosecution Service.

15. Section 690 of the *Criminal Code* does not require, by its terms, that all appellate remedies be exhausted before it can be resorted to. However, as a general rule, though not invariably, the Department of Justice does require that all appellate remedies be exhausted before a section 690 application will be considered. Where a section 690 application is brought on the basis of a defective certificate (and no appellate proceedings were previously taken), it may well be appropriate for the Department of Justice to insist that the accused seek appellate remedies (facilitated by the Crown) before resorting to section 690 of the *Code*. Indeed, as the CLA has submitted, the accused may prefer to proceed in this way. However, the fact that the accused has not applied for leave to appeal from the decision of the Court of Appeal to the Supreme Court of Canada should generally not be regarded as an impediment to a section 690 application. As well, I would point out that there is no statutory impediment to a pardon being granted for a summary conviction offence, whether or not appellate remedies to the Ontario Court of Appeal and the Supreme Court of Canada have been sought.

C. Certificates not Demonstrably Problematic

The more difficult issues arise in connection with certificates not demonstrably flawed pertaining to accused found guilty of offences who are no longer in the court system.

These certificates fall into two categories: (1) certificates where the full supporting documentation remains available, and (2) certificates where limited or no supporting

documentation remains available.

Certificates where Full Supporting Documentation Remains Available

As earlier outlined, these are:

> (a) all cannabis certificates issued between May 8, 1991 and March 8, 2001. In relation to all of these certificates, the lab books remain available and have been fully reviewed. No printouts would be generated in relation to cannabis testing. Accordingly, although there remains a theoretical possibility that some of these certificates are problematic, all of the supporting documentation that existed when the certificates were issued still remains;
>
> (b) all hard drug certificates issued between February 6, 1996 and March 8, 2001. A full review of these certificates, based upon both the lab books and instrument printouts, was done as all supporting documentation remains available.

In my view, where full supporting documentation remains available and has yielded no demonstrable problems in the certificates, the Department of Justice is entitled to assume that these certificates were appropriately issued. Of course, no accused is bound by this position. An accused who does not accept the conclusions drawn by Health Canada is free to apply for relief. However, to be clear, I am satisfied that the Department of Justice need not establish any special protocols for addressing these certificates, other than disclosure of the available supporting documentation, should a request be made by the accused for it.

Certificates where Limited or No Supporting Documentation Remains Available

The certificates for which there is limited or no supporting documentation may be grouped as follows:

> (a) all cannabis certificates issued prior to May 8, 1991, for which there is no supporting documentation;
>
> (b) all hard drug certificates issued prior to January 10, 1991 for which there is no supporting documentation; and
>
> (c) hard drug certificates issued between January 10, 1991 and February 6, 1996 for which instrument printouts no longer exist.

As I earlier reflected, one cannot reasonably assume that all of the certificates, for which no or limited supporting documentation is available, are accurate. There is a possibility that accused whose convictions were based upon these certificates should, in some instances, be entitled to the same relief available to those whose certificates have been clearly identified as problematic.

Recommendations pertaining to Certificates where Limited or No Supporting Documentation Remains Available

It is obviously not practical to attempt to identify and individually locate and notify each accused whose convictions involved these certificates. Nevertheless, some steps should be taken to identify these individuals. Accordingly, I recommend that a public notice be issued, through distribution of a press release to the national and Ontario media and through paid advertisements in selected publications, that articulates the problem and invites any interested parties to make inquiries about the situation. Such a notice would

outline, in general terms, the problems identified by the Health Canada review, the potential relief available for parties who were potentially affected by the subject certificates, how it can be determined whether the certificates of this analyst were involved and how relief can be sought. The notice should make clear that the protocols articulated pertain only to certificates issued by the single analyst.[49] Subject only to any applicable privacy legislation, it would seem that publication of the analyst's name would facilitate the effectiveness of any public notice and serve the greater public interest.

Where an interested party makes an inquiry to the Department of Justice, he or she may not know whether the certificates in question were issued by the subject analyst. The Department of Justice should undertake to make reasonable efforts to ascertain whether the inquiring party had a certificate issued by this analyst and so notify the party.

Should the party wish to seek relief, it should generally be a condition precedent to granting any relief that the party file in the first instance an affidavit. In addition to the items outlined earlier (in the context of a Notice of Intended Application), this affidavit should include any credible basis for believing that the substance was inaccurately described in the certificate. I recommend that a different onus be adopted by the Department of Justice in evaluating its response. Since the government has no evidence that any of these specific certificates are defective, the onus should rest upon the applicant to provide a credible basis for concluding that the certificate was inaccurate and that, had the inaccuracy been disclosed, the result at trial would have been different. However, where it can be shown that evidence to the contrary was tendered by the defence at trial or leave was sought or obtained to cross-examine the analyst at trial, the Department of Justice should consider whether a more generous approach should be taken by it in responding to applications for relief, analogous to the approach to be taken

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[49]Since it is not known whether this analyst issued certificates between June and December 1988, the public notice should identify the relevant time period as extending back to June 1988.

where certificates are demonstrably problematic.

Where the government is satisfied that some remedy should be granted, then that remedy should be provided through some of the mechanisms which were discussed earlier.

D. Quantitative Analyses

Submissions by the Parties

The Criminal Lawyers' Association submitted that the approach to questionable quantifications should be similar to that taken to this analyst's work generally. Any issue as to the impact of questionable quantifications upon trial results should be resolved in favour of the accused. The CLA pointed out that questionable quantifications could impact both upon culpability and upon the sentences imposed.

The Crown prosecutors submitted that a quantitative analysis is of limited utility at trial. The purity of a drug exhibit is often only relevant to sentencing and generally unlikely to have played any role in determining guilt or innocence. It is acknowledged that, in some cases, the quantitative results will be tendered to advance the Crown's position that the accused intended to import the drugs or possessed the drugs with the intent to traffic.

However, it was submitted that, where unacceptable variations were found, one must determine whether the error enured to the benefit of the accused or not. Errors which incorrectly reduced the purity of a drug could have had no adverse effect upon the defence. As for those unacceptable quantifications involving non-adherence to standard operating procedures, where it cannot now be said what the true purity of the substances

was, the Department of Justice will attempt to identify the accused involved and provide disclosure of the problem. As well, even for those cases involving unacceptable variations, whether downward or upward, the Department of Justice will also attempt to identify the accused and provide disclosure, again without prejudice to its position earlier expressed.

Generally, the Department of Justice submitted that a similar approach should be taken to questionable quantifications as should be taken to questionable certificates generally. Where an accused calls into question his or her conviction or sentence on the basis of these quantifications, they should be required to establish that the quantitative analysis materially contributed to the conviction and there is reason to believe the result would have been different, if the true quantification results had been known. The quantifications should not affect guilty pleas. As for sentences imposed, the accused should have to establish that the quantitative analysis materially contributed to the quantum of sentence and there is reason to believe that the result would have been different, if the true quantification results had been known.

Recommendations pertaining to Quantitative Analyses

Generally, I am of the view that my earlier recommendations have application to questionable quantifications, with some modifications. Where the quantifications are demonstrably problematic, the Department of Justice should use reasonable efforts to notify accused to whom these quantifications relate and provide disclosure of the situation. Issues surrounding quantification should also be referred to in the public notice to be disseminated. Should an accused wish to apply for relief based upon questionable quantification results, the Department of Justice should facilitate such an application in the ways earlier described. Of course, where a custodial sentence is at issue, special efforts should be taken to facilitate an expeditious resolution of the issues.

Unlike problematic certificates relating to the identification of the substance, I am not convinced that the Department of Justice should generally assume that problematic quantifications were likely to have affected the trial or the sentence imposed, in the absence of a demonstration to the contrary. The nexus between quantification results and a conviction or sentence may be less obvious. Put simply, the Department of Justice's position should be decided on a case-by-case basis. The Department of Justice is entitled to consider whether the true quantification results demonstrated a higher purity than that represented by the Certificate of Analyst. The Department of Justice is also entitled to consider the present availability of the substance involved for new quantification testing. Where it can be demonstrated that erroneous quantification results figured prominently in the determination of guilt or innocence or in the imposition of a sentence, the Crown should generally consent to appropriate relief. Again, even where consent is not forthcoming, the Crown should facilitate presentation of the problem to the court for its consideration.

CONCLUSION

Health Canada should be commended for their initiative in making full disclosure of the evidence relating to the problematic certificates. Equally laudatory has been the efforts of the Department of Justice to minimize the adverse effect of the certificates on those accused whose cases are still within the system. It is to be hoped that if the protocol I have recommended is implemented, any adverse effect the certificates may have on the remaining accused (and I hope there will be few) may be remedied in a way that enhances the administration of justice.

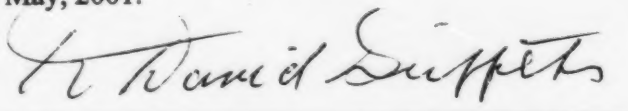
Mark J. Sandler[50] has served as my counsel in this inquiry. He has rendered exceptional and invaluable service for which I am grateful. I am indebted to him and to

[50] Mark J. Sandler, of the Toronto law firm of Cooper, Sandler & West.

Mary Dayton, my executive assistant for their efforts on my behalf.

All of which is respectfully submitted.

Dated at Toronto this 23rd day of May, 2001.



The Honourable W. David Griffiths, Q.C.

Health Canada
Healthy Environments and
Consumer Safety Branch

Santé Canada
Direction générale de la santé environnementale et de
la sécurité des consommateurs

No. - N°

Certificate of Analyst

Certificat d'analyste

I,
Je soussigné

,being a person on the staff of the
,faisant partie du personnel du

Department of Health duly designated prior to May 14, 1997 as an Analyst under the Food and Drugs Act, and thereby also an Analyst Santé, ayant été dûment nommé analyste en vertu de la Loi sur les aliments et drogues avant le 14 mai 1997, et par ce fait, étant aussi within the meaning of and as defined by the Narcotic Control Act, having acted under both of those enactments prior to May 14, 1997, and titulaire de ce titre aux termes de la Loi sur les stupéfiants, ayant agi comme analyste sous le régime de ces deux lois avant le 14 mai 1997, also duly designated as an Analyst under the Controlled Drugs and Substances Act, do hereby certify:
et étant aussi dûment nommé analyste en vertu de la Loi réglementant certaines drogues et autres substances, atteste par les présentes:

1. That at
Que, à

in the province of
dans la Province de

on or about the
le ou vers le

day of
jour de

20

there was submitted to me
, il m'a été soumis

by
par

from
de

a member of the
membre

a sealed and unopened package which bore the following identification marks, initials, or numbers:
un paquet scellé et non ouvert qui portait l'estampille, les initiales, ou les nombres suivants:

APPENDIX A

Certificate of Analyst

2. That I did open the said package and did remove therefrom
Que j'ai ouvert ledit paquet et y ai enlevé

from which I obtained a sample of a substance.
dont j'ai obtenu un échantillon d'une substance.

3. That I duly analyzed and examined the said substance and I found it to contain
Que j'ai dûment analysé et examiné ladite substance et que j'ai constaté qu'elle contenait

within the meaning of the
aux termes de la Loi

Act, to wit:
,à savoir:

4. That this certificate is true to the best of my knowledge and skill.
Que le présent certificat est fidèle au mieux de mes connaissances et de ma compétence.

Dated at
Fait à

this
,en ce

day of
e jour de

20

.....
Analyst - Department of Health
Analyste - Ministère de la Santé

HC/SC (07-00b)

APPENDIX B

Exhibit Envelope

CANADA
DEPARTMENT OF NATIONAL HEALTH AND WELFARE
MINISTÈRE DE LA SANTÉ NATIONALE ET DU BIEN-ÊTRE SOCIAL

HEALTH PROTECTION BRANCH
DIRECTION GÉNÉRALE DE LA PROTECTION DE LA SANTÉ

EXHIBIT NUMBER
NUMÉRO DE LA PIÈCE

H 849575

POLICE FORCE NO. N° DE SERVICE DE POLICE	LAB. NO. N° DE LAB.

PLEASE PRINT MAJUSCULES S.V.P.

Submitting Officer's Name, Number and Rank
Nom, numéro et grade de l'agent qui soumet la pièce

Division or Branch and Location - Division ou Direction et lieu d'emploi

Police Force - Service de police

Return mailing address - Adresse postale de retour

Drug suspected - Drogue soupçonnée

LABORATORY USE ONLY RÉSERVÉ AU LABORATOIRE

Date received - Reçu le:

Name of analyst - Nom de l'analyste

HPB 6201 (3-89)

Health and Welfare Canada
Santé et Bien-être social Canada

April 19, 2001 Press Release

JUSTICE STATEMENT

On March 29th 2001, the Department of Justice was notified by Health Canada that some of the certificates issued by a particular analyst in their Toronto Laboratory might be problematic, and that they were engaged in the ongoing review of the work of that analyst.

Upon receiving this information, the Department of Justice took the following steps:

First, in order to ensure that ongoing cases would not be compromised by those certificates, federal prosecutors throughout Ontario were notified not to rely on these certificates in any ongoing or upcoming drug cases. Prosecutors were also instructed to seek new analysis of drug exhibits as required. These new analysis are being done by Heath Canada on a priority basis.

Our highest priority is to identify any person currently in custody, as a result of a drug conviction or pending trial for a drug case in Ontario, who might be affected by this situation. Accordingly, to that end, the Federal Prosecution Service is working in close cooperation with Correctional Services Canada, Ontario Corrections, the RCMP, the Toronto Police Services and other local police agencies throughout the province of Ontario.

In that regard, in order to accelerate our identification process, we would welcome the assistance of the defense bar in identifying to us any individual currently in custody who might be affected by this situation.

In addition, as indicated in the Press Release, the Honourable W. David Griffiths, a retired Justice of the Ontario Court of Appeal, has been retained to provide advice and detailed recommendations to the Attorney General of Canada concerning steps that should be implemented to ensure affected persons are treated fairly and expeditiously.

Mr. Griffiths will be consulting with stakeholders in the criminal justice system, including the defense bar. He has been asked to report within 30 days.

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